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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 205.

ALBERT B. FALL, SECRETARY OF THE INTERIOR,
Appellant,

vs.

UNITED STATES EX REL. W. T. MOSIER ET AL.,
Appellees.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT.

As stated by counsel for appellant in their brief, this is an action to compel the appellant, by mandamus, to pay to William T. Mosier and Louisa Mosier, his wife, all moneys derived as interest on a certain trust fund belonging to their minor children and all moneys re-

ceived from the shares of said minors as royalties and income from oil, gas, and other minerals belonging to the Osage Tribe of Indians, of which tribe the said William T. Mosier and Louisa Mosier and their minor children are members. The trust fund originally belonging to said Osage Tribe of Indians was, under and by virtue of the act of Congress of June 28, 1906 (34 Statute, 544), distributed among the members of said tribe so that each has been allotted his or her pro rata part. Said moneys so distributed were placed in the Treasury of the United States to the credit of each individual member, said fund to bear interest in favor of each member at the rate of five per cent per annum.

The mineral interests of said Osage Tribe of Indians were not divided, but under said act of Congress were to be held in trust by the United States for the benefit of said Indians for a period of twenty-five years from and after April 8, 1906. Authority was given under said act of Congress to lease said mineral interests at a rate of royalty to be fixed by the President, the proceeds therefrom to be distributed to the members of the tribe pro rata, so that each would receive his or her pro rata part. A distinction was made between adults and minors in the matter of the payment out of their part of the interest money and their part of the proceeds received from the sale of minerals and other properties mentioned. In the case of the adult the income, both interest and royalty, was to be paid direct to the adult. In the case of minors these moneys were to be paid to the parents of the minors until said minors reached the age of twenty-one years, unless the Commissioner of Indian Affairs should become satisfied that such parent was misusing or squandering said money, in which event the Secre-

tary of the Interior was authorized to withhold the payment of the same to the parent.

For a long time prior to the allotment of the lands and moneys of the Osage Tribe of Indians, under the act of Congress of June 28, 1906, above mentioned, the income of the tribe derived from their mineral rights, from their grazing lands, and the interest on their trust fund, was distributed pro rata among the members of the tribe, except in the case of minors, in which case the money was paid to the parents of said minors, except in cases where the parents were misusing or squandering it, in which case it was frequently withheld until such time as the Commissioner of Indian Affairs became satisfied that the parents were not wasting the money in drinking, or idleness, or gambling, but were trying to put it to some good use. That this was the custom of the handling of the affairs of the Osage Tribe of Indians for many years prior to the passage of said allotment act, is not disputed. (Record, p. 9.) Congress in the passage of the Osage allotment act but gave expression in a legislative way to a custom that had long prevailed in the Interior Department in the matter of the handling of the affairs of the Osage Tribe with reference to the matters under consideration. For a period of eleven years from and after the passage of the said allotment act, the Secretary of the Interior, and those acting in authority under him and having to do with the matter of the handling of Osage affairs, construed this act to mean that the moneys derived as interest on the trust fund, royalty on oil and gas, and the so-called "bonus money," was, in the case of minors, to be paid to their parents, unless the Commissioner of Indian Affairs became satisfied that the parents were misusing or

squandering the same, in which event it might be withheld; and that in the payment of the said moneys to the parents the parent was to determine how the same were to be used, and the only matter in which he could be held accountable for the use of the same was the question as to whether he was misusing or squandering it; and not until June, 1917, did the Secretary of the Interior question the right of the parent in handling this money, to do as he pleased with it, so long as it was not misused or squandered, permitting him to handle it in his own way, as his own money. (Record, p. 10.)

In 1917, however, when the fund became larger, a new policy was promulgated by the Secretary of the Interior with reference to the handling of these funds coming from the children's shares. In this new policy it was decided that the parent must show that this fund was being used exclusively for the benefit of the particular minor and was not being handled by the parent as he saw fit, and that unless the parent did show that the fund was being used exclusively for the benefit of the minor, it would be construed a misuse, which would warrant the Secretary of the Interior in withholding the same from the parent. Thus, all the former holdings of the Secretary of the Interior with reference to this fund were set aside and this new policy adopted. (Record, p. 10.)

It is the claim of the appellees that this position on the part of the appellant is unauthorized and is not warranted by law, and, as it deprives the parents in this case from the moneys they are entitled to under said act, the courts will compel the Secretary to pay out said moneys in accordance with said law.

In addition to the proposition as to whether or not

the Secretary may be compelled to pay out said moneys, there is another question involved, which in a way comes under said general proposition and yet which requires a separate consideration, and that is that the so-called "bonus money" is comprehended in the term "royalty" as used in said act of Congress with reference to oil, gas and other mineral leases. This will be treated more extensively later.

The appellant has refused and continues to refuse, ever since June, 1917, to pay to William T. Mosier and Louisa Mosier, *as parents of the minors involved in this case,* any of the moneys derived as interest on the trust fund or as royalty and bonus from the mineral rights of said Osage Tribe of Indians. It is true that a part of the so-called "bonus money" that was derived from the sale of oil and gas leases up to January 1, 1919, was paid to William T. Mosier, as *special guardian* of said funds of said minor children, under appointment by the county court of Osage County, Oklahoma, and the taking out of letters of guardianship was required of said William T. Mosier by the Secretary of the Interior, before said bonus money would be paid to him as such guardian. The Secretary of the Interior had declined and refused to pay over said bonus money to said William T. Mosier *as the parent of said children,* and has ever since done so, and is doing so now.

From and after June, 1917, the money coming as interest on the trust fund and as royalty from the mining of oil and gas belonging to the Osage Tribe of Indians, was refused and denied by the Secretary of the Interior to the said William T. Mosier as the parent of said children, except upon the condition that he receive it as the money of said minor children, and

expend it as the money of said minor children, and not expend or use any part of the same for his own benefit, or for the benefit of the mother of said minor children, or for the education and care of the family in general, or in his private business. *It is not true that any moneys have been paid to William T. Mosier and Louisa Mosier since June, 1917, coming from the tribal interests of said minors, except upon the condition that said Mosier receive said money as the children's money and accounted for accordingly.* This we claim is contrary to the purpose, intent and spirit of the law, and without lawful authority.

As to the bonus money, there is no dispute as to the absolute refusal of the Secretary of the Interior to pay the same to William T. Mosier and Louisa Mosier. (Record, p. 12.) As to the royalty and interest money, there is no dispute of the fact that the Secretary refuses to pay the same to William T. Mosier and Louisa Mosier, except upon the condition that they receive it as the money of the children, without any right on their part to use said money as they saw fit so long as they did not misuse it or squander it in the handling of their own affairs. (Record, p. 11.)

Said act of Congress of June 28, 1906, in providing for the leasing of said Osage mineral interests, provided that the rate of royalty should be fixed by the President. In fixing the royalty upon oil and gas the President determined the same as one-sixth of the oil and gas produced, and in some special cases at one-fifth of the oil produced; and in the regulations of the Secretary of the Interior providing for the leasing of said oil and gas interests, it was determined that in addition to said one-sixth and one-fifth respectively, leases should be offered to the highest bidder on a cash basis.

In the sale of oil and gas leases, various amounts were received in cash, in addition to the amount specified in the contract to be paid to the Osage Tribe of Indians, and this cash has been designated by the Secretary of the Interior as "bonus," and a distinction is sought to be made by him between the status of this money called "bonus," and the status of the money received from the one-sixth and one-fifth royalty interest, as above stated.

The contention of the appellee is that said act of Congress, in providing for the royalty to be paid to the members of the tribe, intended to and did by such term cover *all income* received by the tribe from said mineral interests, and that no distinction can be made between the status of the money received as a premium in the sale of said leases, and the status of the money received from the royalty interest as specified in the lease contracts, so far as regards its distribution under the act of 1906.

This is the situation that now confronts this court in the determination of this controversy.

Long after the commencement of this action, to wit, on March 3, 1921 (41 Stats. 1249), Congress amended the act of 1906, and therein gave specific direction respecting payments thereafter made to the members of the Osage tribe, but this legislation can have no bearing on this action.

As we view this case, the three principal questions involved may be stated as follows:

First. Has the parent of a minor member of the Osage Tribe of Indians, under the act of Congress of June 28, 1906 (34 Stat. L., 544), the right to receive the moneys derived from the mineral interests of said tribe, and the interest money coming from the share

of such minor, and may such parent use the same in the education of his children, and in the support of the family in general, and in the furtherance of his own business interests; or must he account for the handling of such money the same as a legal guardian would have to account for the same?

Second. Is the so-called "bonus money," derived from the sale of oil and gas leases on Osage lands, a part of the "royalty" received from said oil and gas leases as comprehended by that term as used in said act of Congress of June 28, 1906?

Third. Can the Secretary of the Interior, by mandamus, be required to pay said moneys to the parent of said minors?

ARGUMENT.

First.

Has the parent of a minor member of the Osage Tribe of Indians, under the Act of Congress of June 28, 1906 (34 Stat. L., 544), the right to receive the moneys derived from the mineral interests of said tribe, and the interest money coming from the share of such minor, and may such parent use the same in the education of his children, and in support of the family in general, and in the furtherance of his own business interests; or must he account for the handling of such money the same as a legal guardian would have to account for the same?

In determining the question as to the right of these appellees to receive the moneys derived from their children's tribal interests, until said children arrive at their majority, it is necessary to give close considera-

tion to the provisions of said act of Congress of June 28, 1906.

Said act of Congress was entitled "An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes." The funds of the Osage Indians were divided, and each one's part placed in the Treasury of the United States, to be held in trust for him. The lands, with the exception of a few small tracts, were divided among the members of the tribe, giving to each his *pro rata* part, except "that the oil, gas, coal, or other minerals covered by the lands, for the selection and division of which provision is herein made, are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the 8th day of April, 1906." In section five of said act, it was provided that at the expiration of the period of twenty-five years from and after the first day of January, 1907, the lands, mineral interests and moneys held in trust by the United States should become the absolute property of the individual members of the Osage Tribe.

In addition to the trust fund and the interest to be received from the same, there were other funds which received the attention of Congress in said act, and that was the royalty received from minerals; the sale of town sites; claims which may be found to be due from other Indian tribes and from the United States; money to be received from three reservations, with one hundred and sixty acres each; and a specific provision was made as to the disposition of all of these funds.

Section four of said act, down to the third sub-division, reads as follows:

"Sec. 4. (Trust fund.) That all funds belonging to the Osage Tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage Tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided:

"First. (Segregation of funds—pro rata division—interest payments—misuse of interest money of minors—payments to guardians.) That all the funds of the Osage Tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due said Osage Tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of said Osage Tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs, as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

"Second. (Deposit of funds to credit of Indians—distribution of.) That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

As will be observed by a careful reading of the above section, Congress was specific in stating what moneys should be held in trust by the United States for the members of the Osage Tribe of Indians and what moneys should be paid out. It provided that all the funds of the tribe, all the moneys then due, or that may thereafter be found to be due, all the moneys that may be received from the sale of Osage lands in Kansas, all the moneys found to be due the tribe on claims against the United States, after all proper expenses were paid, should be segregated as soon after January 1, 1907, as was practicable and placed to the credit of the individual members of the tribe on a basis of a *pro rata* division, the same to draw interest as then provided by law, which was five per cent. This con-

templated only such property claims and money as the tribe then had, and not profits or earnings to be received in the future. Congress provided that said interest as it accrued should be paid quarterly to the members entitled thereto, except in the case of minors, in which case it provided that said interest should be paid to the parents of said minors until said minor arrived at the age of twenty-one years. Congress, however, put a limitation upon the right of the parent to receive the interest on said minors' shares, by providing that if the Commissioner of Indian Affairs became satisfied that the interest of any minor was being misused or squandered by the parent he might withhold the payment of such interest. *Congress did not say how the parent should use said money, or put any limitations upon his right to use said money coming from the interest of a minor, except that the same should not be misused or squandered.*

At the time of the passage of said act the interest from the minors' shares was being paid to the parents under regulations of the Secretary of the Interior, without any qualification as to how the parent should spend it, except that he must not misuse or squander it. The interpretation placed upon this provision of the law by the Secretary of the Interior, and those under him whose duty it was to enforce the law, at the time of the passage of the law, was that the parent had the right to receive said money *as the head of the family* and use it as he saw fit, so long as he did not misuse or squander it, and this interpretation was the interpretation of all of the Secretaries of the Interior, and those under them, for more than eleven years after the passage of said act. If Congress had intended that the parent might be held to account to

the minor for said money it would undoubtedly have said so and made provision for the appointment of a guardian to protect the interest of said minor from being misused or squandered. No provision was made for the appointment of a guardian of the estate of a minor until the act of Congress of April 18, 1912 (37 Stat. 86), and then only for *orphan minors*. Evidently Congress, in providing as it did with reference to this matter, had in mind the long-established custom and policy with reference not only to dealing with the Osage Tribe of Indians, but with all other tribes of Indians by the Government, and that is that all moneys were to be paid to the heads of families, and the *pro rata* part which would otherwise be due to the minors in any Indian family, should be paid to the head of the family for the use and benefit of the whole family. If Congress had intended to change this well-established custom with reference to the Osages, undoubtedly it would have so provided. The act, however, by its plain and reasonable terms, does not mean anything else than that the interest of the minor should be paid to the parent, and the parent required to use it in a frugal, honest way, and not be permitted to use it for improvident and wrongful things, or to squander it in gambling, drinking, and such other things. Ample power was given to the Secretary of the Interior and the Commissioner of Indian Affairs, to make the parents of minors frugal, industrious and sober, and to train them to follow business occupations, and to make of themselves good and useful citizens, by keeping from them the interest on the minors' shares, unless they did use such interest in such way.

It is conceded by the appellant in this case, on pages six and seven of his brief, that appellees belong to

that class of people that do not squander their income. The only possible excuse, then, that can be offered by the appellant in this case for withholding from these appellees the interest of their minors, is that the same was being misused by these appellees, because they did not use each minor's share for the specific and sole benefit of such minor, and because it was used by the appellees in properly raising and educating their said children, and in proper business management, and because other members of the tribe squandered their income, overlooking the fact that the law provides ample means to prevent squandering of funds by parents by withholding payment from those who do squander it.

It is not denied that these appellees, by being frugal, careful, economical and using good business judgment, had accumulated a large fortune, and it is not claimed by the appellant that these appellees have either misused or squandered any part of the funds coming to them from the interest of their minors, except on the theory that all of said interest of each minor was not used for the specific and sole benefit of said minor.

The trial court, in passing on this phase of the case, very clearly stated the law as follows (Record, p. 21):

> "This act is a comprehensive piece of legislation, having for its object the division of the lands and funds of the Osage Indians in the then Territory of Oklahoma, and it is so entitled. In effecting its object striking evidence of its policy with respect to the interests of minors having living parents, is manifest. By section 2 of the act it is provided that selection of the lands belonging to such minors 'may be made by said parents,' and

by the provision of section 7, it is enacted 'that parents of minor members of the tribe *shall have the control and use* of said minors' lands, together with *the proceeds of the same*, until said minors arrive at their majority. (Italics by the court.) Section 4 provides that the interest to be paid by the United States on certain funds and moneys belonging to minors and held in trust for them by the Government 'shall be paid quarterly *to the parents* until said minors arrive at the age of twenty-one years.' And by the same section it is provided that royalty received from the sale of oil and other mineral leases upon the land selected and divided as stated above, and the moneys received from the sale of other specified lands shall be distributed to the individual members of the Osage Tribe 'in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States.'

"It seems clear from the foregoing résumé of the material portions of the statute under consideration that it was the intention of Congress to give to the *parents* of minor members of the tribe the *beneficial use* of so much of their children's property as is to be divided and distributed under the terms of the law, during the children's minority."

And again in the opinion, with reference to the proposition as to whether or not the appellant might limit the amount to be paid to the parent and might direct how the money should be expended by the parent, says (Record, p. 23):

"Coming now to the second question to be answered, it is to be observed that the contention of the respondent in this respect rests upon his interpretation of the first proviso of section 4 of the

statute. That proviso is in the following language: '*Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest.'

"The respondent's interpretation of this proviso takes the form of a limitation upon the use by the parents of a minor of the money of the latter paid to the former, both in respect of the amount and its application. He insists that such money can be used only for the benefit of the minor exclusively, and if not so used it would be deemed by the Commissioner of Indian Affairs as a misuse or a squander of said money, and further payments would be withheld except to the amount of $40.00 per month.

"In the opinion of the court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money as they are to have the use of the minors' lands and the proceeds of the same. A use, no doubt, that shall be wise and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens.

"To use these funds in hazardous or speculative undertakings, or in lavish and extravagant expenditures would be to misuse or squander them, and in that event the restraining hands of the Commissioner of Indian Affairs could and should be laid upon them. These are the possibilities that the limitation of the proviso is designed to guard against. It was not intended to clothe the Commissioner or the Respondent with authority to dictate the limit of the amount that the parents could expend *exclusively* upon their minor children from these moneys. The statute makes

the parents, not the Commissioner or the Respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant. But in order that the Commissioner may inform himself as to whether the limitation of the proviso *as its boundaries have been marked out herein,* are observed by the parents of the minors, it will not be an unreasonable exaction to require them to furnish him periodically with full statements of the expenditures by them of the moneys of their minor children received by them pursuant to the provisions of the statute that we have been considering."

It is this opinion of the Supreme Court of the District of Columbia that was upheld by the Court of Appeals of the District of Columbia. Record, p. 27.

It seems clear that if the parent has the right to receive this interest on the trust funds of the minors until the minor reaches his majority, and has the right to use it as he sees fit, so long as he does not misuse or squander it, then the Secretary of the Interior, as above set out by the trial court, could not control the *amount* that should be paid to the parent, *or put any limitations whatever upon it, except the one specified by the statute, to wit, the parent must not misuse or squander the same.*

Second.

Is the so-called "Bonus Money," derived from the sale of oil and gas leases in Osage lands, a part of the "Royalty" received from said oil and gas leases as comprehended by that term as used in said act of Congress of June 28, 1906?

We now come to the second proposition, that is, is the so-called bonus money included within the term royalty, as designated in said act, and does it come within the class of money that is to be paid out, or does it fall within that class of money that is to be held in trust by the United States? Referring to the second subdivision of said section four of the act of 1906, *supra*, it will be noted that Congress specifically provides that royalty received from the mineral leases, moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each, and all moneys received from grazing lands, shall be distributed to the individual members of the tribe, according to the roll "in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided." The "except as herein provided" of course refers to the right to withhold the share coming from the minors' interest from the parent, where the parent misuses or squanders it.

In the course of handling the affairs of the Osage Indians the Secretary of the Interior has adopted a new term for some of the income coming to the tribe, and designates it a "bonus." It is not disputed or denied that this bonus comes from the mineral leases;

to be more specific, from the oil and gas leases. It is a part of the income derived from the mineral reservation to the tribe. It might properly be said that in the first place for convenience it was termed bonus, which is a term that has recently grown up in the oil and gas fields and applied to oil and gas leases where money is received in addition to a stated royalty. But this so-called bonus must fall within one or the other of the two main divisions of the money belonging to the tribe as defined in the act of 1906—(*a*) that which is to be placed in the Treasury and held in trust for the tribe, and on which the tribe will receive interest, or (*b*) it must fall in that class *which is to be paid out.*

It would appear from a proper reading of the allotment act that there could be no question but that it fell within that class of moneys that is to be paid out, and this construction is strengthened by the fact that the Secretary of the Interior ever since the payment of the first bonus on leases sold in 1912, has paid and is still paying out this bonus money pro rata to the members of the tribe, except in the case of minors, which since June, 1917, he has either wihheld absolutely, or has paid to persons holding letters of special guardianship in behalf of said minors. If the appellant's contention is correct, that bonus is not part of the royalty, then he was violating the law by paying out this money to members of the tribe prior to March, 1921, instead of holding it in trust for them.

This in effect is the conclusion reached by the Comptroller of the Treasury in the following language:

> "I am constrained to decide that, within the purpose and meaning of the act, bonus money received from the sale of leases for oil, etc., *should*

be classed with royalties and which is required by the second exception to section 4 *to be placed in the Treasury* to the credit of the members of the Osage Tribe of Indians as other moneys of said tribes are to be deposited, *for distribution to the individual members of said Osage Tribe,* and therefore that said bonus moneys do not bear interest."

23 Decisions of Comptroller of the Treasury, pp. 483, 486.

It is plain from argument of counsel for appellant, and from the answer of the appellant to the petition in this case, that the basis and the reason for the position taken by the appellant, is the fact that in the last few years the income of the Osage Tribe of Indians from its oil interests has grown enormously, and the funds that were being paid out were so large that it looked to him like a great wrong to pay the minors' interest over to the parents without requiring them to account to the minor for it. *In other words, an attempt is made herein by the appellant to make expediency the law, in place of following the language of the statute.*

If it was correct in 1912 and in after years up until 1917, to pay over the bonus derived from the children's share to the parent, then the mere fact that in 1917 and since that time the amount has greatly increased, is no reason for assuming that the law was different from the position taken theretofore. However, the law did not leave the appellant without a proper remedy. It gave to him the right to withhold the interest of any minor when it was being misused or squandered, and if this law had been enforced in accordance with its terms, the complaint that is being made in this

case against the extravagance and waste and profligacy on the part of parents of the Osage Tribe of Indians would not exist, and such parents if they had been compelled to show that they were attempting to use this money judiciously and to the best interests of their family, and in trying to pursue some business methods or qualifications, and if they could not make such showing that the money would be withheld from them, we would see them now all prosperous and doing well. But the fact that there may be parents who are squandering and misusing the funds which come to them from their children's share, or their own funds, is no reason or justification for withholding this money from these appellees, who are admittedly frugal, industrious, economical, and prosperous. It would seem that it would be more in line with the plain intention of Congress and the correct interpretation of the law in question, if the appellees in this case were rewarded for their industry, economy and frugality, and permitted to go on advancing their interests and the interests of their family. It is evident that the children of these parents will not suffer by reason of their money being paid to them, as provided by law, because in the long run the children will receive the benefits of the financial success of these parents.

Congress intended, in line with the long-established policy of the Government, to give to the Indian, if possible, a superior advantage in transacting his daily business, and in competing with his more astute and sharp white brother, and that is one of the reasons why Congress provided that these moneys should be paid to the parents. Another reason is that Congress recognized the necessity for the education and care of these minors, so that they would grow up educated and

useful people, and therefore by this provision made it sure that the parents would be enabled to properly educate and rear their children, and put in the hands of the Commissioner of Indian Affairs the whip to make them properly educate their children by autorizing him to withhold from parents the children's money. Congress has the power to change this law, and the duty of the appellant is to follow the law, whether it suits him, or whether it does not suit him. He has no legislative capacity.

Complaint is made in the pleadings and in the argument that a large number of Osage parents are wasting and squandering this money. If that is true, then the plain duty of the appellant under the law is to withhold it. There is no requirement that he should pay it out to parents who misuse or squander it; the only requirement is as to those parents who do not misuse or squander it. The strained position taken by the appellant in this case, in order to limit the amount of money that should be designated as royalty under the terms of the act, is not justified merely on the ground of expediency, to keep from paying out money to those who are rightly entitled to it.

Third.

Can the Secretary of the Interior, by mandamus, be required to pay said moneys to the parent of said minors?

On the third proposition we are confronted with the statement that even if our position is correct as to the right of the parent to receive the money derived from the minors' interests, we can not by mandamus compel the Secretary to comply, and that therefore we are

not entitled to the relief asked. We do not concede that position of the appellant. On the contrary, the pleadings and stipulation in this case, together with the statement of counsel for the appellant, show beyond question that the position of the appellant now and ever since June, 1917, has been that he will not pay any money to these appellees coming from their children's shares, except on the guaranty that said money shall be used exclusively as the child's money, and for the use and benefit of each particular child. It is not claimed by the appellant that this money has been paid to these appellees except on the condition and absolute showing that it was received as the child's money, used as the child's money, and that no part of the same was used for the benefit of these appellees. This has specific reference to the interest on the trust fund of the minors, and to the moneys designated as royalty interests. So far as the so-called bonus money is concerned, it is not contended that any part of the same since 1917 has been paid to these appellees as parents, but it is the claim of the appellant that the same has been denied to these appellees, and that the appellant has not paid the same to these appellees *as parents,* for the reason that under the law he could not pay it to them *as parents,* but must either withhold it, or pay it out to someone holding authority as guardian to receive it.

It seems to us that under the law it is useless to plead facts further than have been pleaded setting up this state of affairs. The bonus money has been denied to the parents, and is so admitted. The so-called royalty and interest money has been denied to the parents, except upon the absolute showing and guaranty that it was received as the child's money, and would

be used in no other way. If the contention of the appellee is correct, or if it were a possible reasonable construction of the law, that the parent has not right to receive this income except as the representative of the child, and has no right to use it in any other way except for the exclusive benefit of the child, and cannot use it in general in the family, in educating the children and in his business, then we are not entitled to the writ prayed for. But if on the other hand, these appellees did have the right, and still have the right, so long as they do not misuse or squander the same, to receive said money and use it in a proper way, then we are entitled under the facts in this case, to the writ prayed for; and if our contention is correct, that the term "bonus" belongs to that class of moneys that must be paid out the same as the interest on the trust fund is paid out, then even from the standpoint of the appellant, we are entitled to the writ in this case, because no contention is made that they were denied the right to receive that money as parents, even at a time when the Commissioner of Indian Affairs was regularly finding that these parents were properly using and handling this money as the children's money. In determining this matter it must be borne in mind, as hereinbefore stated, it is not claimed that these appellees belong to that class of Indians that misuse or squander their money, or misuse or squander any moneys coming into their hands. That proposition is conceded by the appellant in this case, and the whole proposition resolves itself down to the question: May the appellant, by a misconstruction of the law deny the appellees their plain rights?

See Payne, Secy., *et al., vs.* U. S. *ex rel.* Newton, 255 U. S. 438.

The law of mandamus is that the courts will not seek to control the actions of an officer with reference to which he has a discretion, or with reference to judicial acts. It is different with reference to ministerial acts. In Merrill on Mandamus, page 30, section 30, this language is used:

> "A ministerial act is one which a public officer or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."

Citing thereunder—

> Insurance Company *vs.* Wilder, 40 Kans., 561.
> Gray *vs.* State, 72 Ind., 567.
> United States *vs.* Whitney, 16 Dist. Col., 370.

And on page 279, section 225, the same author says:

> "A positive refusal is also not necessary in all cases before a writ of mandamus will lie to compel the performance of a duty. The law never demands a vain thing, and when the conduct of the officer is equivalent to a refusal to perform the duty desired, it is not necessary to go through the useless formality of demanding its performance. Anything showing that the defendant does not intend to perform the duty is sufficient to warrant the issue of a mandamus."

In this case, beginning with June, 1917, as shown by appellees' petition, notice was served on the appellees by the appellant that the moneys in question would not be paid to them as they had been previously paid, record, p. 4, and that they would in the future receive no funds belonging to their children as their own, ex-

cept the amount of $40.00 per month per child, afterwards changed to $50.00 per month, record, p. 5. They were also notified, as is shown by the pleadings and the admitted facts in this case, that no part of the so-called bonus money would ever be paid to them except as a guardian of the same for their children, and this notice from the appellant has been from that time until now specifically followed and carried out. Record, p. 12. We have therefore the specific refusal, the written notice to the appellees that they could not receive these moneys, actually carried out and enforced. What more could be done to lay the foundation for a writ of mandamus, if the action of the Secretary in refusing to pay was wrongful and was in derogation of the rights of the appellees?

Construction of Statutes.

In view of the importance of this case to these appellees, and the importance in which it is viewed by the appellants, we feel that we are justified in calling the court's attention to rules of construction of statutes, because this case resolves itself entirely upon what is the proper construction of the statute in question.

The attention of the court is again called to the admitted fact that at the time of the passage of the allotment bill and for a long time prior thereto, as well as for eleven years thereafter, the uniform policy followed by the Government, both before the enactment of said statute and afterwards, in carrying out the terms of said statute, was as is contended for by these appellees. Very much weight will be given to the conditions as they were at the time of the passage of the law, and very much weight will be given to the position taken by those whose duty it was to enforce the law at

the time of its passage, and who necessarily were in a position to know more about the objects and purposes of the same than those who would follow in office many years thereafter. We do not admit that there is any ambiguity in this statute, or that there is any special necessity for calling in anything in aid of a correct construction, but for fear that this controversy may raise in the mind of the court a question as to whether or not the statute was of a doubtful construction, we desire to call the court's attention to a discussion of the matter in 25 Ruling Case Law, section 252, page 1012, which reads as follows:

> "In construing a statute the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but, where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. When the words of a statute are not explicit, the intention of the legislature is to be collected from the context by considering the subject-matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be obtained and the remedy in view, by comparing one part with the other and giving effect to the whole by looking to the old law upon the subject, if any, and to other statutes upon the same or similar subjects, by considering the effects and consequences of a particular construction, and by looking to contemporaneous legislative history and contemporaneous construction of the statute."

If the court adopts the position taken by counsel for appellees, the statute is plain and clear, and is not in need of any aid, and we take it a citation on that well-established rule is not necessary.

In 36 Cyc., p. 111, section 4, paragraph A, this language is used:

> "In construing a statute the legislative intent is to be determined from the general view of the whole act with reference to the subject-matter to which it applies, and the particular topic under which the language in question is found."

Page 1106, 36 Cyc., section 2, paragraph A, we find this langauage:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority."

We do not offer anything further than these fundamental principles on the question of statutory construction. We assume that the court has had this proposition before it so often that the calling of the attention of the court to the fundamental principles is sufficient.

May the court appoint a guardian of the funds coming from the shares of minor members of the Osage tribe while said minors have living parents?

In the discussion by counsel for appellant of the status of the funds in question in this case, it is contended that Congress, by the act of April 18, 1912 (37 Stat. L., 86), provided for the appointment of a guardian of the estates of minors where the same were being wasted or misused. Reference to section 3 of said act shows that Congress provided:

> "That the property of deceased and of orphan minors, insane, or other incompetent allottees of the Osage tribe, * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma."

This is all there is to said act conferring jurisdiction upon the county courts and specifying those members of the tribes whose estates would fall within the jurisdiction of said courts. At the close of said section there is this proviso:

> "That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misued by such parents."

The question as to whether a guardian could be appointed for a minor whose parents are living was very carefully considered by the Supreme Court of Oklahoma in the case of Williams *vs.* Hewitt, 181 Pac., 286. In that case the court very distinctly held that no jurisdiction was conferred upon the county courts of Oklahoma to appoint a guardian for the estate of a minor whose parents are living. So that at this time there is no authority for the appointment of a guardian for the estates of minor Osage members of the tribe so long as the parents of such minors are living, but even if authority had been granted under the terms and provisions of said act as above set out, it would have no bearing upon the proposition involved in this controversy. The most that could be said with reference to said proviso is that it relates back to the act of Congress of June 28, 1906, and specially refers to the proviso in said act which authorized the withholding

of the funds coming from the shares of minors in cases where the parents were misusing or squandering them, and in such cases where the same were not paid out to the parents that a guardian of such funds might be named by the court. We cannot see that it has any bearing upon this case or is persuasive of the proposition urged by counsel for appellant, but because of the fact that counsel have submitted the argument they have, we make reference to it here.

Counsel for appellant also referred to parents of minor members of the tribe as "natural" guardians. There is no such thing under the laws of Oklahoma as a natural guardian of an estate. The only guardians of estates are those that are appointed under some specific law. *The funds that have heretofore been paid to parents of minor Osages have been paid to the parents as heads of the family, or as parents of the minor, and not in any capacity whatsoever as a guardian.* We therefore think that we are correct when we say that the question of guardianship from any viewpoint has no bearing whatever upon the merits of this controversy.

Conclusion.

In conclusion it should be said that the pleadings as well as the brief filed on appeal in this court evidences that the appellant concedes that the distribution as provided for in the Act of 1906 was sufficient to govern payments to the members of the Osage Tribe at that time because the amounts then paid to the several members was small, but his theory, in defense of his action complained of, rests upon the assumption that by the Act of 1906, the Secretary of the Interior was invested with power to change, modify, or amend the

distribution as provided for in that Act, when in his judgment the circumstances, that is, when payments to the several members increased, warrant the exercise of that power.

There is clearly no basis for this assumption of power. The Act of 1906 is plain and unambigous and its construction, as evidenced by its administration, coincident with the passage of the act, and for many years thereafter, if later believed to be unsatisfactory, on change in circumstances, the facts should have been brought to the attention of Congress and amendment sought in the proper way, as was done in the Act of March 3, 1921, hereinbefore referred to.

In this brief we have tried to confine ourselves strictly to the issues involved. We have not gone off after extraneous matters, or attempted to bring into the case a discussion of affairs and conditions which are not involved in, or appertain to, the controversy between these appellees and the appellant. Fine-spun theories and hypothetical cases which have no bearing have been left out. We have not gone off on any hunting or fishing expeditions, in the hopes that we would make a catch which would appeal to the court. We have tried to confine ourselves to the naked proposition involved, and that is that these appellees, being economical, frugal, industrious people—people who did not misuse or squander any funds coming into their hands—are entitled under the law to receive the funds coming from their minor children's shares, known and designated as interest on the trust fund, royalty, and bonus on mineral leases; that this right is a statutory right given to them, and which cannot be denied or taken away except upon a specific finding by the Commissioner of Indian Affairs that they are misusing or

squandering this fund. It is admitted that they do not misuse or squander moneys coming into their hands and that they are successful and prosperous people. They are denied the right to receive this money on what we believe to be a wrong construction of the law and a wrong enforcement of the same as against them. This is what we are seeking to have remedied. We believe that the lower courts were correct in the conclusions reached, and therefore respectfully ask that these decisions be affirmed.

Respectfully submitted,

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